(3)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR.

CR.APPEAL NO. 2457 /99

(2135)

15/9/99
S.D. Gupta
Adv.

Appellant:- Bhagwandas son of Sunderdas Pankila, aged 27 years, r/o village Khamariya Distt. Durg MP.

Versus.

Respondent:- The State of M.P.

APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

HIGH COURT OF CHHATTISGARH AT BILASPUR

CORAM : HON'BLE SHRI FAKHRUDDIN AND HON'BLE SHRI DHIRENDRA MISHRA, JJ.

CRIMINAL APPEAL NO.2457 OF 1999

Appellant : Bhagwandas

versus

Respondent : The State of M.P.

Present : Mr. Anand Mohan Tiwari, counsel for the appellant.
Mr. Akhil Mishra, Panel Lawyer for the respondent/State.

JUDGMENT

(Delivered on 7th of July, 2006)

As Per Dhirendra Mishra, J. :

The appellant has preferred this appeal under Section 374(2) of the Code of Criminal Procedure against the impugned judgment dated 18-6-1999 passed by learned Additional Sessions Judge, Bemetara in Sessions Trial No.349/97, whereby he has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life and pay a fine of Rs.500/-, in default

of payment of fine, to further undergo rigorous imprisonment for two months for causing death of his wife Saraswatibai.

2. Case of the prosecution in brief is that the appellant married Saraswatibai two months prior to the date of incident, i.e., 26-7-1997. On 26-7-1997, the deceased and the appellant slept together in the night, however, around 21.30 hours in the night, when appellant was going out, his mother asked him about his going. On this, the appellant kept quiet. At about 22.30 hours in the night, P.W.-3, Moongabai, the mother-in-law of the deceased asked for a glass of water from deceased Saraswatibai. When no reply came from her, she went inside and saw that Saraswatibai was not talking. On this, she called relatives through her other son Ishwar, who, after examining the deceased, declared her dead. At that time, the appellant was not present, therefore, suspicion arose against him that he has killed his wife by throttling.

3. The matter was reported by P.W.-1, Churamandas @ Baldu in the Police Station Khumaria vide Ex.P-1. Thereafter, investigation was commenced after preparing inquest (Ex.P-8) in the presence of witnesses. The dead body was sent for autopsy to the Primary Health Centre, Khumaria, where Dr. H.N. Gupta (PW-6) conducted the post mortem over the dead body of the deceased and submitted his report (Ex.P-3). On the basis of the First Information Report, merg intimation was recorded as per Ex.P-2. Site-map was

prepared by Halka Patwari vide Ex.P-5 and submitted the report vide Ex.P-6. After completing investigation, charge-sheet was filed in the Court of Judicial Magistrate First Class, Bemetara, who, in turn, committed the case to the Court of Sessions Judge, Durg, from where learned Additional Sessions Judge, Bemetara received the case on transfer for trial.

4. Learned Additional Sessions Judge framed charge under Section 302 of the Indian Penal Code against the appellant. However, the appellant abjured the guilt.

5. The prosecution in order to establish the charge against the appellant has examined 13 witnesses in all. Statement of the accused was also recorded under Section 313 of the Code of Criminal Procedure, in which the appellant admitted that the deceased was his wife, however, he has denied the circumstances appearing against him in the prosecution case and submitted that he had gone to the Police Station to give information regarding unnatural death of his wife, whereupon the Station House Officer stated that you must have killed her, and accordingly, he was implicated falsely. Learned trial Court, after hearing the arguments of the Public Prosecutor and the counsel for the appellant, held the appellant guilty and convicted and sentenced him as mentioned above.

6. Learned counsel for the appellant has seriously disputed the finding of the Court below that the cause of death was throttling. He vehemently argued that as per the post mortem report, which is proved by Dr. H.N.Gupta (PW-6), it would be evident that no ligature mark was seen at the time of post mortem on the neck of the deceased and further that on internal examination semi-digested particles of rice were found in the trachea which is not possible in case of throttling. Learned counsel further submits that there is no evidence available on record to show that the appellant was present in his house at the relevant time and the alleged extra judicial confession made by the appellant before the witness Ramji (PW-2) cannot be acted upon as he made that statement for the first time and there is no diary statement of this witness available on record.

7. On the other hand, learned counsel for the State supported the impugned judgment.

8. We have heard learned counsel for the parties.

9. Learned counsel for the appellant has seriously disputed the finding of the Court below that the cause of death of the deceased Saraswatibai was due to throttling. P.W.-6, Dr. H.N.Gupta, who has conducted the post mortem over the person of the deceased, has found following injuries :-

> Rigor mortis present slight on both upper limb. Rigor mortis present on both lower limb. Mouth closed. Eyes reddish. Nails blue. Bloody froth present over mouth and nose. Right side of upper border of thyroid cartilage deeply congested and also muscles of right side of front of neck. Left side of thyroid cartilage less congested to right side muscle of front of right side of neck also congested less as compare to right side. Front of nose flat.

The doctor has further stated that the skull, brain, membrane, ribs, lung, larynx and trachea, right lung, left lung, membrane, membrane of intestines, mouth and food-pipe, liver, spleen and anus were congested. There was froth and semi-digested rice present in trachea and larynx. Semi-digested rice was also present in stomach. On the basis of the above finding, he has opined the cause of death of the deceased as throttling and the mode of death as asphyxia.

10. The argument of learned counsel for the appellant is that the presence of the semi-digested food particles in the trachea negates the possibility of death due to throttling and in the absence of ligature mark over the neck, the Court below was not justified to hold that the cause of death was throttling. However, these aspects pointed out by learned counsel for the appellant at this stage have not been put to the doctor in his cross-examination. Even otherwise,

from the symptoms noticed by the doctor in the post mortem report, we find that the symptoms of death due to asphyxia were present as there was presence of bloody froth over mouth and nose, the nails were bluish, and in the absence of any cross-examination in this regard to the doctor, who has categorically opined that the cause of death of the deceased was throttling, we are unable to accept the argument of learned counsel for the appellant that the prosecution has failed to prove this aspect.

11. There is no eye-witness to the incident and the case of the prosecution is based on circumstantial evidence. The Court below, relying upon the circumstantial evidence, which is summarized hereunder, has held the appellant guilty as mentioned above : -

(i) The appellant and the deceased were husband and wife and they were residing together at the relevant time.

(ii) The appellant made extra judicial confession.

(iii) The deceased died in the house of the appellant and her cause of death was throttling.

(iv) The appellant had sustained injuries and no explanation was offered therefor.

12. So far as the first circumstance that the appellant and the deceased were husband and wife and they were residing together

under same roof is concerned, it is not disputed by the defence. So far as the second circumstance that on the date of incident the deceased and the appellant were present together in the home is concerned, the appellant has seriously disputed this fact and stated that on the date of incident, he was out of the village in connection with his work, and his mother P.W.-3, Moongabai has also stated that on the previous night, Bhagwandas and his wife were slept together, however, the accused Bhagwandas was not in home and he had gone outside the village for displaying video. This witness has been declared hostile and in the cross-examination, initially she denied that when Bhagwandas returned, Saraswatibai was dead, but subsequently she stated that by the time Bhagwandas returned home, Saraswatibai was dead. The appellant has taken a plea of alibi before the Court below, but no witness has been examined to establish his presence at the time of incident in other village. Therefore, considering the fact that both were husband and wife and they lived together, a false defence of alibi has been taken by the appellant and the same cannot be accepted. Apart from the above evidence, P.W.-2, Ramji, who is an independent witness, has categorically stated that on the date of incident, when he was returning from Lohara in the night at about 10-11 P.M., he saw that the vehicle of Ward Member Mahesh Yadav was standing on the square near the Police Station and he also saw that Bhagwandas was standing outside the Police Station and on enquiry as to where

he has come, he informed that he has killed his wife and he is going to Police Station. In the cross-examination, he has further stated that when he met Bhagwandas, he was all along and he did not go inside the Police Station with Bhagwandas. He has denied the suggestion put by the defence that Bhagwandas had stated him that his wife is behaving unnaturally and, therefore, he is going to call a doctor. From the statement of this witness and particularly his cross-examination, we are of the opinion that this witness is a witness of truth and the fact that he met Bhagwandas on the relevant date and on the place described by him has not been disputed by learned counsel for the appellant. We further find that injuries were found over the person of the appellant also, as has been stated by P.W.-6, Dr. H.N.Gupta, who has examined the appellant on the following date of the incident and had found swelling over the left collar bone of size 4x2½ cm. and reddish in colour and the above injury was caused within 24 hours of the time of examination. There is no explanation offered by the appellant as to how he received that injury. Thus, considering the circumstances relied upon by the trial Court to convict the appellant, we are of the considered opinion that the involvement of the appellant in the crime in question is established and the Court below has not committed any illegality or infirmity.

13. In the result, we do not find any substance in the instant appeal and the same deserves to be dismissed and is accordingly dismissed.

Sd/-
Fakhruddin
Judge

Sd/-
Dhirendra Mishra
Judge

Gowri/Gopal